FOO CHEE TUCK

v.

CHONG AH HONG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 23-4-1986]
3 DECEMBER 1986

TRUSTS: *Power of attorney - Irrevocable - Whether obtaining an interim restraining order is an abuse of power of attorney - Whether power of attorney is a general power or for a specific purpose - Whether power of attorney is in fact revocable.*

The plaintiff, donee of an irrevocable Power of Attorney executed by the 1st defendant, had obtained an interim injunction restraining the 1st defendant, its servant or agent from operating any account in the name of Syarikat Loong Auto Maintenance and interfering in any way in its business; requiring the 2nd defendant, the 1st defendant's bankers, to furnish the plaintiff with statements of all accounts held by the 1st defendant and Syarikat Loong Auto Maintenance and restraining the 2nd defendant from allowing the 1st defendant to operate any of the named accounts. The 1st defendant applied to have the restraining order set aside, pleading non-disclosure of material facts. Before the Judge, however, the 1st defendant maintained that the plaintiff had abused the Power of Attorney by obtaining the interim injunction and questioned whether the Power of Attorney is a general power or one created for a specific purpose and whether it is revocable.

Held:

[1] The plaintiff had not abused any of the powers of the Power of Attorney as the intention behind the creation of the Power of Attorney was to secure the 1st defendant's outstanding debts with the plaintiff and subsequent advances from the plaintiff. The Power of Attorney was purposely expressed in very wide terms as to give the plaintiff absolute control over the 1st defendant's properties.

[2] The irrevocable Power of Attorney, although expressed in general terms, was created for the sole purpose of securing the 1st defendant's debts with the plaintiff, an earlier Power of Attorney executed by the 1st defendant also as security for the 1st defendant's debts with the plaintiff and containing similar terms but revocable at will, having been revoked and substituted two days later with the now irrevocable Power of Attorney.

[3] The Power of Attorney executed by the 1st defendant, being an authority coupled with an interest, is what it is expressed to be an irrevocable Power of Attorney. In any event, the 1st defendant by his conduct leading to the execution of the Power of Attorney and by expressing it to be irrevocable, is estopped from asserting it to be otherwise.

[1st defendant's application dismissed with costs.]

Case referred to:
Walsh v. Whitcomb [1797] 2 Esp 565

For the 1st defendant/applicant - K.Y. Chung; M/s. Chye, Chow, Chung & Co.
For the plaintiff/respondent - Sarjit Singh; M/s. Sarjit Singh Sidhu & Co.

JUDGMENT

Siti Norma Yaakob J:

The plaintiff in this suit is the donee of an irrevocable Power of Attorney executed by the first defendant on 22 March 1985. Following the filing of this suit, the plaintiff proceeded to apply *ex parte* and obtained an interim injunction restraining the first defendant, its servant or agent from operating any account in the name of Syarikat Loong Auto Maintenance and from entering and interfering in any way in the premises and business of the said Syarikat Loong Auto Maintenance. The restraining order also required the second defendant, the first defendant's bankers to furnish the plaintiff with statements of all accounts held by the first defendant and the said Syarikat Loong Auto Motor Maintenance, particularly those relating to a loan account secured by a legal charge over the property HS(D) 42103, Lot 30821, Mukim of Petaling, the overdraft account secured by a legal charge over property No. 3, Jalan 19, Taman Overseas Union, Kuala Lumpur and account no. 1030107 and to allow the plaintiff to operate the three accounts. The second defendant is also restrained from allowing the first defendant, his servant or agent to operate any of the three accounts above.

In obtaining the interim restraining order, the plaintiff was exercising his powers under the Power of Attorney as the claims that the first defendant was heavily indebted to him and that the Power of Attorney was executed as security for the payment of such debts.

Dissatisfied with the restraining order, the first defendant applied to have it set aside and in his affidavit in support, he pleaded non-disclosure of material facts as a ground for the removal of the order. However in the course of arguments before me, the first defendant did not proceed on the non-disclosure aspect of the case, no doubt satisfied with the rebuttals made by the plaintiff in his affidavit in reply but instead questioned the conduct of the plaintiff and the legality of the irrevocable Power of Attorney on the following grounds.

1. Whether the plaintiff had abused the Power of Attorney by obtaining the interim injunction.
2. Whether the Power of Attorney is a general Power of Attorney or one created for a specific purpose.
3. Whether the Power of Attorney which is declared to be revocable is indeed so.

To determine whether the plaintiff had abused the powers given under the Power of Attorney, it is necessary to consider the intention behind the creation of the Power of Attorney. It is not disputed that the first defendant is heavily indebted to the plaintiff since 1984 as he had accepted advances of money from the plaintiff to assist him in his business, the Syarikat Loong Auto Motor Maintenance and also to make payments to his creditors that included the second defendant. The first defendant has, by letter dated 12 November 1984, admitted his indebtedness to the plaintiff and had also promised to make monthly payments towards the advances but unfortunately he was unable to keep up with his promise. There is also evidence from the many affidavits that in order to secure subsequent advances from the plaintiff the first defendant had executed the Power of Attorney in favour of the plaintiff. This is also corroborated by the affidavit of the solicitor who drew up the Power of Attorney and before whom it was signed. She has affirmed that she had explained all the implications of the terms to the first defendant and he had agreed that it should be so expressed. Thus the Power of Attorney was executed for valuable consideration and it was purposely expressed in very wide terms as to give the plaintiff absolute control over the first defendant's properties as if they were his own. To that extent, I do not consider that the plaintiff had abused any of the powers in the Power of Attorney when he obtained the interim injunction.

As to whether the Power of Attorney was a general one or one created for a specific purpose, here again the intention of the first defendant in creating the Power of Attorney becomes very relevant. Perusal of the Power of Attorney without more, clearly indicates that it is a general Power of Attorney but bearing in mind that the first defendant is heavily indebted to the plaintiff, I hold that it was created for the specific purpose of securing the first defendant's debts with the plaintiff. Moreover, prior to the execution of the irrevocable Power of Attorney, the first defendant had executed an earlier Power of Attorney on 8 January 1985 containing similar terms as to that of the irrevocable Power of Attorney except that it was revocable at will. There is evidence that the first Power of Attorney was also executed as security for the large sum of money advanced by the plaintiff to the first defendant. Subsequently, when the first defendant needed further advances, he revoked the earlier Power of Attorney on 20 March 1985 and two days later, substituted it with the irrevocable Power of Attorney. There was no rebuttal by the first defendant on this. Thus the irrevocable Power of Attorney, although expressed in general terms, was created for the sole purpose of securing the first defendant's debts with the plaintiff.

The first defendant also contends that the Power of Attorney although expressed to be irrevocable, is a revocable Power of Attorney as the donor is at liberty to recall his authority. In the case of *Walsh v. Whitcomb* [1797] 2 Esp 565, Lord Kenyon held that generally from their very nature, Powers of Attorney are revocable except where a Power of Attorney is part of a security for money in which case it is not revocable. On the facts of the case before me as the Power of Attorney executed by the first defendant is an authority coupled with an interest, it is therefore, what it is expressed to be an irrevocable Power of Attorney. In any event, at the time of obtaining the interim injunction, the first defendant had not revoked the Power of Attorney and by his very conduct leading to its execution and by expressing it to be irrevocable, he is now estopped from asserting it to be otherwise.

Lastly, the first defendant had not shown that he had suffered any damage as a result of the interim injunction. On the contrary, there is evidence to show he is dissipating his assets to defeat the plaintiff's claim and for all the reasons that I had given above, I had dismissed his application with costs.

Also found at [1987] 1 CLJ 271